

No. 11710

IN THE

**United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

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EVERETT H. CALLAN,

*Appellant,*

*vs.*

FLOYD COPE and ARTHUR AUSTIN,

*Appellees.*

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**APPELLEES' REPLY BRIEF.**

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APPELLEES' REPLY BRIEF.

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Statement of the Case.

The facts of this case, insofar as they appear to appellees to be relevant to this appeal, are as follows:

On October 16, 1944, at Newport Beach, California, appellant was employed as a seaman and fisherman on the Gas Screw "Atlas" [Ap. 40, 41, 42, 80]. On that date, but prior to the employment of appellant, appellee Floyd Cope, hereinafter referred to as "Cope," the owner of the said "Atlas," had by oral agreement effected a bare-boat charter of said vessel to appellee Arthur Austin, hereinafter referred to as "Austin," under the terms of which the exclusive management, use, and control of the vessel in every respect vested in Austin [Ap. 78-81, 26-30, 35-36, 57]. Appellant requested employment from Cope, but was told that Austin had leased the

vessel and appellant would have to ask him [Ap. 25, 77]. Cope thereupon introduced appellant to Austin and Austin hired him [Ap. 77, 79-80]. Thereafter on October 18, 1944, an explosion, the exact cause of which has never been explained, occurred on the vessel as a result of which appellant was injured [Ap. 45-49, 61-72, 82-89]. The time said explosion occurred the vessel was taking on gasoline [Ap. 45-49, 61-72, 82-89]. The gasoline hose was held and the nozzle controlling the flow of gasoline was operated by appellant [Ap. 65, 67-69]. Austin ordered appellant not to start fueling until the engines had been cut off [Ap. 83]. Appellant nevertheless proceeded to fuel the vessel [Ap. 65, 67-69]. Austin was out of sight when this occurred [Ap. 83-84].

As a result of the explosion and appellant's consequent injuries, appellant suffered amnesia which, according to appellant's medical expert, could have substantially impaired his ability to remember incidents which preceded the explosion [Ap. 50-52].

Prior to bringing the action against appellees herein, appellant brought an action against the General Petroleum Company in the Superior Court of the State of California, in and for the County of Los Angeles, wherein he alleged that the injuries he suffered were caused by the negligence of the General Petroleum Company [Ap. 68-72].

Upon the evidence presented by appellant the District Court dismissed the libel against both respondents upon both counts.

### Argument.

Appellees in reply to the matters set forth by appellant in his opening brief believe that the questions before this Honorable Court are as follows:

- I. Is libelant, in view of the evidence, entitled to recover from Cope for maintenance and cure?
- II. Is libelant, in view of the evidence, entitled to recover from Austin for maintenance and cure?
- III. Has libelant established a case under the Jones Act (46 U. S. C. A. 688) for recovery of damages against Cope?
- IV. Has libelant established a case under the Jones Act (46 U. S. C. A. 688) for recovery of damages against Austin?
- V. Was the action of the District Court in decreeing a dismissal after appellant had rested proper?

The above points have been discussed by appellant in his opening brief together with a reference to the matter of this appeal being a trial *de novo* and an alleged error of the District Court in assuming that exceptions in Admiralty actions are saved without being requested.

The latter two questions can be disposed of briefly at this point, the other matters being reserved for discussion under appropriate headings hereafter.

We cannot quarrel with the proposition that this appeal is a trial *de novo*. The rule is well established. But it is equally well established "that findings of fact reached

upon conflicting testimony and based upon the credibility of witnesses whom the District Court saw and heard will not be reversed, unless error is clear,"

*Benedict on Admiralty*, Vol. 4, page 61, *et seq.*,

and it is "elementary that weight of evidence on issue determined by trial judge is not to be reviewed."

*Barlow v. Pan-Atlantic SS. Co.*, 101 F. (2d) 697.

As to appellant's discussion with respect to the District Court's alleged error in assuming that appellant's exceptions were saved, appellees can merely state that such error, if any, did not in any way prejudice appellant, since appellees have not and are not taking the position that appellant has waived any right to assert the error of any rulings made by the District Court upon appellant's objections to any evidence introduced.

## I.

### **The Libelant Is Not Entitled to Recover Maintenance and Cure From Cope Because Cope Was Not His Employer.**

The right of a seaman to maintenance and cure is regarded as being a right which springs from his contract of hire. It thus depends upon the existence of a contract wherein an employee-employer relationship is established. Where this relationship does not exist there can be no recovery for maintenance and cure by the injured seaman.

*Hardin v. Gordon*, 2 Mason 541, 11 Fed. Cas. 480;

*Cortis v. Baltimore Insular Line* (1932), 28 U. S. 371.

Where the true owner has parted completely with the management and control of the vessel as by a bareboat charter, the charterer becomes the owner *pro hac vice* and the crew members become employees of the charterer and not of the original owner and hence, since the right to maintenance and cure stems from the agreement of employment, the employer or charterer would be the one to whom the seaman must turn for relief.

*The Carrier Dove* (1899), 97 Fed. 111, at p. 112;  
*Cromwell v. Slaney* (1933), 65 F. (2d) 940.

Appellant's choice of authority and the language of his argument would indicate that he agrees with this principle (App. Br. p. 6).

Nor can liability be imputed to the true owner because of any agency principle since under a bareboat charter the master of a vessel is not regarded as the agent of the owner of the vessel during the life of the charter party.

*Baccarat v. Mahoney Co.* (1931), 4 Fed. Supp. 611;

*The Duchess*, 16 F. (2d) 1003.

A review of the evidence will show that the District Court was correct in finding that there was complete demise of the vessel from Cope to Austin and that there was no contractual relationship between Appellee Cope and Appellant [Ap. 57, 77-82, 24-32, 35-36].

Under such circumstances recovery for maintenance and cure could not be had against Cope.

II.

**Libelant Is Not Entitled to Recover Maintenance and Cure From Either Austin or Cope Because of Libelant's Improper Conduct.**

Although a seaman may not be barred from his right to recovery of maintenance and cure because of his contributory negligence, recovery will not be allowed to him where his injury was caused by his own wilful or gross misconduct. This rule is as ancient as the rule providing for maintenance and cure itself.

"The expenses of curing himself of any illness or injury occasioned by his own improper conduct are thrown upon the seaman by the Laws of Oleron, Art. 6."

4 L. R. A. (N. S.), p. 72;

48 American Jurisprudence, p. 117.

Wilful disobedience of orders, such as in this case, constitutes such misconduct as qualified the right of a seaman to maintenance and cure.

*The City of Carlisle*, 39 Fed. 807, at p. 813.

We submit that the District Court properly found that the actions of appellant in loading gasoline while the engine was running amounted to gross misconduct on his part particularly in view of the fact that appellant owned a vessel and knew of the extreme danger of such a situation [Ap. 65-67], knew where the controls were and had ready access to them [Ap. 63], and in wilful disobedience

of the master's specific order [Ap. 83] recklessly continued his course of conduct. If the explosion was caused by the taking on of the gasoline under these circumstances, as appellant contends, appellant caused it and no act or failure to act on the part of appellees contributed to it.

### III.

#### **Libelant Cannot Recover Damages Under the Jones Act Against Cope Until He Has Established an Employer-Employee Relationship.**

"The Jones Act and the Employers' (Railway) Liability Act which it incorporates by reference are specifically drawn to give rights to employees against employers and against no others."

*Benedict on Admiralty*, Vol. 5, p. 202;

*Eggleston v. Republic Steel Corp.* (1942), 47 F. Supp. 658.

Where a vessel has been chartered and the true owner has parted with the possession, use, control and operation of the vessel the seaman does not have his cause of action under the Jones Act against the owner although he may have against the charterer.

*Baccarat v. Andrew Mahoney Co.* (1938), 4 F. Supp. 611;

*Gardiner v. Agwilines* (1939), 29 F. Supp. 348.

Appellees have reviewed the evidence in connection with Point I *supra* and the same circumstances apply here.

IV.

Libelant Cannot Recover Damages Under the Jones Act Either Against Austin or Cope Because No Negligence on the Part of Appellees Was Proved.

Unlike an action for maintenance and cure the "gravamen of a Jones Act suit is negligence."

*Benedict on Admiralty*, Vol. 1, p. 50, citing;

*The Princess Matoika*, (1925), A. M. C. 1547;

*The Cioca* (1925), 7 F. (2d) 676;

*The Rawleigh Wainer* (1937), 88 F. (2d) 298.

There is nothing in the record to show how the explosion occurred. Much evidence was produced with respect to the taking on of gasoline while the vessel's engine was in operation but no evidence whatsoever was brought forth which showed that the explosion was caused by this. Appellant in his libel specifically set forth that the taking on of gasoline with the engine running was a negligent act on the part of appellees and his position in this regard is reiterated by his stipulation [Ap. 97-98] that this is the *only* act complained of. The record shows absolutely no evidence that (1) the explosion was caused by this act or that (2) the maintenance of the running engine was a negligent act on the part of appellees.

Appellant seeks to avoid the necessity to prove negligence by asserting that the doctrine of *res ipsa loquitur* applies (App. Br. p. 7).

Appellees reply to this assertion by stating that the doctrine of *res ipsa loquitur* is fundamentally grounded on the principle that "the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it and that plaintiff has no such knowledge."

38 American Jurisprudence, p. 995.

This situation does not apply here for appellant has asserted in his libel that he knew what caused the injury [Ap. 3-4, 97-98]. He cannot now because he has failed to prove his assertion cast the obligation upon appellees to explain what happened. If he shows some knowledge of what happened the reason for the rule ceases and correspondingly the rule ceases.

*Shaine, "Res Ipsa Loquitur,"* p. 483;

*Connor v. A. T. and Santa Fe. Railway Co.,* 189 Cal. 1.

Appellees further submit in this regard that in order for the doctrine of *res ipsa loquitur* to apply, it must appear that the instrumentality which produced the injury complained of was at the time of the injury under the exclusive management or control of the defendant or of his agents and servants.

38 American Jurisprudence, p. 996;

*Cruse v. Sabine Transp. Co. (1937),* 88 F. (2d) 298.

If, as appellant seems to contend the injury was caused by the explosion of the gasoline while the engine was running, appellant himself had exclusive charge of the instrumentality which caused the injury, to-wit, the flowing gasoline [Ap. 46-49]. He was certainly in a better position than appellees to know the cause of the accident.

The *Cruse* case cited *supra* was similar to the instant case in that it was an unexplained explosion case. In that case the court refused to apply the doctrine of *res ipsa loquitur* and made the significant comment that the explosion could have been caused by a spark from a wrench in the hands of the workman disconnecting the gas hose. We call the court's attention to the fact that this could very well have happened in the instant case since appellant worked with a wrench near the gasoline fumes in removing the gas cap from the tanks [Ap. 65].

Appellees further contend that while contributory negligence may not be a complete defense to an action under the Jones Act, nevertheless, the negligence of appellant prevents the application of the doctrine of *res ipsa loquitur*. One of the prerequisites to the application of the doctrine is that the injury occur without fault of the injured person. In the case cited by appellant, *Jesionowski v. Boston & M. R. R.* (1942), 67 Sup. Ct. 403, quoting from *San Juan Light & Transit Co. v. Requence*, 224 U. S. 89, the court said: "Where a thing causes injury *without fault of the injured person* (italics ours) etc." the doctrine of *res ipsa loquitur* applies.

In this case it certainly cannot be contended that appellant was without fault. Appellees submit that his action in loading the gasoline while the motors were running, when he had had experience with vessels [Ap. 65-66], amounted to wilful misconduct on his part, particularly when the same was done contrary to the orders of Austin [Ap. 83].

Appellant has gone into the question in his brief that appellees, because of the circumstances, did not supply a safe place in which to work, that is, that the vessel was unseaworthy. This contention will not warrant recovery unless it is shown first, that as a matter of fact such a situation created an unsafe place to work or rendered the vessel unseaworthy, and, second, that the situation caused the explosion. Neither of these was shown by appellant and for the reasons hereinbefore given he cannot shift the burden of going forward with the evidence regarding them to appellees but must himself prove the allegation.

In this regard the appellees further make note of the fact that appellant did not plead unseaworthiness but that he elected to proceed on negligence [Ap. 3-47]. The Jones Act requires an election of remedies.

*Pac. SS. Co. v. Peterson* (1928), 278 U. S. 130;

and appellant having elected to proceed on negligence should not be permitted now to urge unseaworthiness.

V.

The District Court Did Not Err in Dismissing the Libel Against Both Austin and Cope.

Appellant in his brief states that objections were raised to proceeding to trial on the cause before Austin had filed his answer. He cites pages 22 and 23 of the Apostles in support of this. A perusal of these pages indicates that no objection was made but rather that appellant declared that he was ready for trial. No question can arise regarding the action of the court with respect to Cope and we submit for the reasons hereinafter set forth, that the court had power to do what it did with respect to Austin.

At the close of libelant's case respondent moved for a "non-suit." This Honorable Court will recognize, however, from a review of the record that what was actually done was that a decree of dismissal was entered. Libelant had not made out a case against either Cope or Austin by his proofs and since it was not incumbent upon respondents to introduce any evidence, and since their story was completely told when they were called by libelant, libelant was in no way prejudiced by the court's act. No useful purpose could have been served by forcing a later hearing in the case of Austin since the issue with respect to negligence and the burden of proving the same, would have been the same. All of the facts with respect to this were represented to the court under oath and by all of the parties who could possibly know the facts. All parties involved had been examined, and pursuant to the facts as developed no liability was found to exist.

Admiralty procedure is not encumbered with the technical niceties of ordinary civil practice. There is consider-

able latitude and flexibility permitted and exercised. Justice is promoted by this approach.

3 Benedict on Admiralty 110.

No injustice or prejudice was suffered by appellant. He stated that he was prepared for trial, put on all of the evidence he had, and the court found that the same was insufficient. Appellant could not have required either of the appellees to testify or put on a case except in the manner in which they did, that is, under Rule 43(b). All of the facts in the case were presented before the court. Appellant had been given his full day in court against both Austin and Cope. How can he be heard to now complain of the fact that a motion was improperly named.

### Conclusion.

Appellees believe that the District Court properly disposed of the issues involved in the case and that the decree should be affirmed in every respect.

Respectfully submitted,

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